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Supreme Court, U.S.
FILED

No. _____

08-181 AUG 11 2008

In The OFFICE OF THE CLERK

Supreme Court of the United States

JESSE JAMES HOLLYWOOD,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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DEATH PENALTY
QUESTION PRESENTED FOR REVIEW

When there exists uncontroverted evidence that a deputy district attorney assigned to prosecute a yet to be tried capital murder case secretly enters into an arrangement to become a consultant to film-makers creating a major motion picture that has since been released to the public prior to the trial of that case, provides the film-makers with unlimited and unsupervised access to the prosecutor's files, violates the law and rules of professional conduct, and attempts to hide his consultation after discovery by the defendant, should that deputy district attorney and his office be disqualified from prosecuting the case in order to protect the defendant's right to a fair trial and due process of law?

LIST OF PARTIES

Petitioner's co-indictees in the lower court are Ryan James Hoyt, William Robert Skidmore, Jesse Taylor Rugge, and Graham William Pressley. Each of these parties was convicted prior to the issues raised herein and each is presently serving a sentence for their convictions.

None of these parties were participants in the proceedings below which are a subject of this petition for writ of certiorari.

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The California Supreme Court's decision is reported at 43 Cal.4th 721. (App., *infra*, 1-23.) The Court of Appeal of the State of California, Second Appellate District's decision, review of which the California Supreme Court conducted, was vacated. That opinion is reported at 49 Cal.Rptr.3d 598. (App., *infra*, 24-48.)

JURISDICTION

The judgment of the California Supreme Court was entered on May 12, 2008. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

Petitioner recognizes this Court has previously held that the issue of pretrial disqualification of counsel in a criminal prosecution is not immediately reviewable. *Flannagan v. U.S.*, 465 U.S. 259 (1984). Yet, in this case immediate review of a decision not to disqualify prosecutor is required to protect a right, "the legal and practical value of which would be destroyed if it were not vindicated before trial." *U.S. v. MacDonald*, 435 U.S. 850, 860 (1978). This issue is completely independent of the merits of the action; resolution of the issue determines whether a challenged counsel and his office will be allowed to participate in its prosecution.

Most significantly, the constitutional question to be resolved warrants immediate attention. The

alarming activities of the prosecution will become commonplace unless this Court establishes clear standards in an area of extraordinary public importance and lack of Supreme Court guidance.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

Petitioner is charged by Indictment found true and filed on October 30, 2000, in the Superior Court for the State of California, County of Santa Barbara, with the August 8 to 9, 2000, special circumstances first degree murder and the August 6 to 9, 2000, kidnaping for purposes of ransom or extortion of Nicholas Markowitz.

Petitioner was arrested in Brazil on or about March, 2005, and returned to the United States for prosecution for these charges. Four other defendants charged in the same Indictment had been convicted and are now serving sentences for their crimes.

Petitioner's prosecution is currently scheduled for trial February 19, 2009.

The People of the State of California seek the death penalty.

2. THE UNCONTROVERTED EVIDENCE

On or about March, 2003, after obtaining convictions of four individuals for their role in the kidnaping and killing of Nicholas Markowitz, the prosecutor assigned to try petitioner agreed to, and did assist film-makers in the creation of a screenplay and fictional major motion picture based on the individuals and circumstances surrounding the kidnaping and killing of Nicholas Markowitz. In so doing, the prosecutor became a "consultant" to the film-makers and

illegally provided them with unlimited and unsupervised access to all the materials and information in possession of the prosecutor's office. These materials included the prosecutor's entire file, not limited to law enforcement investigative reports, criminal history reports, probation reports, psychological reports, audio recordings, as well as video recordings and photographs which depict strip searches of defendants and images captured from the grave-site and autopsy of Nicholas Markowitz.

The prosecutor met with and spoke to film-makers on numerous occasions, providing detailed personal views and opinions regarding the crime and its participants. He assisted the film-makers with character development for the film and with contacting potential witnesses in petitioner's upcoming trial. After the film-makers contacted and interviewed these witnesses and co-defendants, the prosecutor participated in subsequent conversations concerning these witnesses' interviews. The prosecutor never made any attempt to obtain information from the film-makers regarding the numerous interviews and potential witnesses or co-defendants, or to seek preservation of the contents of those interviews. Potentially exculpatory information may never be obtained due to the prosecutor's desire for secrecy.

His consultations continued until just before Petitioner was apprehended in March, 2005.

The prosecutor sought to keep his role as a "consultant" confidential and requested that the film-makers conceal the source of the materials and information he provided them. There was an understanding that his conduct as a consultant was to be kept confidential. After Petitioner's discovery of the prosecutor's conduct, he communicated with the one film-maker with whom he had the most contact and, as a result of those communications, that film-maker became un-cooperative with the defense.

Specifically:

The prosecutor admitted the following:

he became a consultant;

he provided the film-makers his entire file;

he was unaware of the contents of his file;

the prosecutor admitted he was careless in his dissemination of the information contained in his file;

claimed he was unaware of California Law as that law relates to the dissemination of information;

denied seeking secrecy for his conduct;

made factually inaccurate statements that minimized the nature and extent of his conduct as a consultant to film-makers;

incredulously claimed he became a consultant due to his sole desire that the film assist in the apprehension of petitioner;

that his objective in acting as a consultant was to assist in the creation of a film which depicted the events surrounding the crimes alleged in the manner in which he viewed the commission of the crimes alleged;

claimed Thomas Sneddon, then District Attorney for the County of Santa Barbara, was unaware of his role as a consultant. One of the film-makers stated the prosecutor told the film-maker that Mr. Sneddon was aware the prosecutor was acting as a consultant and that the prosecutor would have been unable to act as a consultant but for the approval of Mr. Sneddon.

"Alpha Dog," the film on which the prosecutor became a consultant was released nationally in January, 2007, prior to petitioner's trial. The film is graphic in its depiction of the events surrounding the kidnaping and killing of Nick Markowitz' character and in its view of the petitioner's character. Petitioner's character is portrayed in a highly inflammatory manner, as extremely manipulative, vicious, selfish, and without any redeeming character traits whatsoever. The film appears to be a precise rendition of the prosecution's theory of the case, portraying petitioner as the central character in the alleged crime(s).

At the conclusion of the film, special thanks are given in the credits to the "Santa Barbara Sheriff's Department" and to "Ron Zonen," the prosecutor assigned to the case. Mr. Zonen is not identified as a Santa Barbara Deputy District Attorney.

The film has heightened public condemnation of Petitioner, and will serve to inflame any potential jury.

The uncontroverted evidence demonstrates that from the very beginning, the prosecutor sought to keep his role as a "consultant" confidential and requested that the film-makers conceal the source of the materials and information provided. Finally, after Petitioner discovered the prosecutor's conduct, the prosecutor continued in his efforts to conceal his activities.

3. RECUSAL OF THE PROSECUTING ATTORNEY

In or about August, 2005, petitioner discovered the prosecutor's activities through one of the film-makers, who sought to exchange portions of the prosecutor's files for access to and an interview with petitioner. Once petitioner learned of the nature and extent of the prosecutor's relationship with the film-makers and the prosecutor's conduct, petitioner moved in September, 2005, to recuse the prosecutor and his office from the case, contending that, based

on the uncontroverted evidence, the prosecutor and his office suffered from a disabling conflict of interest which would prevent petitioner from receiving a fair trial. After hearings on this motion in the Superior Court for the State of California, County of Santa Barbara, the trial court denied the motion.

Petitioner sought a writ of mandate in the Court of Appeal of the State of California, Second Appellate District. That Court summarily denied the petition. Petitioner then sought review with the California Supreme Court, which issued an order to show cause. On October 5, 2006, the Court of Appeal of the State of California, Second Appellate District granted in part and denied in part the writ of mandate, ordering the prosecutor, but not his office, removed from the case. Petitioner and the State of California sought review of this decision.

The California Supreme Court accepted review and, in its judgment, reversed the Court of Appeal, allowing the prosecutor and his office to try petitioner's case.

REASONS FOR GRANTING THE PETITION

This case is one of first impression. No federal or state court previously has addressed a scenario remotely resembling the circumstances here. This Court should grant the petition for writ of certiorari and find that when there exists uncontroverted

evidence that a prosecutor acts as did the prosecutor here, he and his entire office should be disqualified.

A decision refusing to recuse the prosecutor and his office permits that prosecutor to set in motion a chain of events which will inevitably destroy the integrity and credibility of any verdict reached in the case, as well as of the criminal justice system as a whole.

A prosecutor should not become a participant in an entertainment based financial enterprise which is the subject of a case in which he is involved and which is not yet final. This is particularly true when his participation makes him a consultant, responsible for gathering and disseminating the entire contents of his file, assisting in potential witness interviews, and providing character analysis and theory. This is shockingly true when the entertainment based financial enterprise is a major motion picture starring Bruce Willis, Sharon Stone, and Justin Timberlake in his acting debut. The pending case is a special circumstance murder prosecution in which the death penalty is sought. Critically, the motion picture has already been released internationally in theaters, on cable television, and for home rental.

The Prosecutor's conduct qualifies as a disabling factor which demonstrates a bias and conflict of interest, prejudices Petitioner and warrants disqualification. To hold otherwise is to condone his conduct, ignore the consequences, deny petitioner his right to

due process and a fair trial. Because death is involved, courts must be particularly sensitive to ensure every safeguard be observed. *Gardner v. Florida*, 430 U.S. 349, 357; *Gregg v. Georgia*, 428 U.S. 153 (1976). Allowing such a prosecutor and his office to remain on the case sets an unconscionable precedent for those in charge of dispensing justice.

This cannot be allowed.

1. THE ARRANGEMENT BETWEEN A PROSECUTOR AND FILM-MAKERS CREATES A DISQUALIFYING CONFLICT OF INTEREST

Many cases have addressed the removal of defense counsel in a criminal prosecution. *See e.g., Burger v. Kemp*, 483 U.S. 776 (1987) (no conflict where partner attorneys represent co-indictees); *Nix v. Whitesdate,* 475 U.S. 157 (1986) (no conflict where client proposed to fabricate testimony); *Mickens v. Taylor*, 535 U.S. 162 (2002), referring to *Holloway v. Arkansas*, 435 U.S. 475 (1978) (conflict in representing divergent interests of three co-defendants); *Cuylet v. Sullivan*, 446 U.S. 335 (1980) (no conflict of interest in successive representation of three defendants in separate trials); *Wood v. Georgia*, 450 U.S. 261 (1981) (potential conflict where counsel has divided loyalty). But, this Court has infrequently examined under what circumstances should a prosecutor be removed from a case. Understandably, the preference is to refrain from broad strokes, and "deal with it on a case

by case basis. . . ." *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 877, fn.18 (1987).

Here, however, petitioner seeks disqualification of a particular prosecutor and his office not because of an isolated incident of aberrant, overzealous conduct, but based on an arrangement the prosecutor entered into with film-makers creating a major motion picture. It is the nature of this arrangement that threatens petitioner's right to a fair trial and due process of law. Although no court in this nation previously has addressed circumstances such as these, this Court has found a disabling conflict of interest where an inappropriate arrangement exists.

In *Young*, this Court held that where a private attorney is appointed to prosecute a criminal contempt action, an arrangement exists warranting reversal of the conviction, where that counsel is also counsel for a party that is the beneficiary of the contempt order. *Id.*, 481 U.S. at 809. In so ruling, this Court stated, "An arrangement represents an actual conflict of interest if its potential for misconduct is deemed intolerable." *Id.*, at 807, fn.18. Such potential became actual in this case.

Here, the prosecuting attorney, under the eyes of an approving office, entered into an arrangement with film-makers to assist in their creation of a screenplay and major motion picture about a capital murder case the prosecutor had been assigned to try. He was, by his own admission, their "consultant." The potential for misconduct discussed in *Young* became

more than a mere concern when the prosecutor violated the law and rules of professional ethics, lied, and sought secrecy. His conduct, in the view of both the California Supreme Court and Court of Appeal of the State of California became, "highly inappropriate and disturbing" (App. 22.) and "cannot reasonably be equated with the 'highest degree of integrity and impartiality.'" (App. 41.) Thus, in his zeal, and as a result of his role as a consultant, he went too far.

The prosecutor's office is obligated not only to prosecute with vigor, but also to seek justice. This theme was stressed more than half a century ago in *Berger v. U.S.*, 295 U.S. 78, 88 (1935): "[the prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." By joining in a film-making, profit based enterprise, the subject of which is a death penalty prosecution he is assigned to try, he abrogated his prosecutorial obligations in favor of those to the film-makers. This scenario presents a shocking example of not what can, but what does happen when a prosecutor enters into an arrangement representing a conflict of interest.

The existence of an interested prosecutor requires no showing of prejudice, nor any other error in the proceedings. "[S]ome errors 'are so fundamental and pervasive that they require reversal without

regard to the facts or circumstances of a particular case.' We find that the appointment of an interested prosecutor is such an error." *Young*, at 809-810, quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

The California Supreme Court's decision refusing to disqualify the prosecutor and his office was not only erroneous, it resulted in a miscarriage of justice which condones conduct presenting a grave danger to the proper administration of justice. The allure of such an arrangement with the media, and the possibility of fame and fortune it entails, gives rise to a likelihood of recurrence which cannot be ignored.

2. CLEAR GUIDANCE MUST BE ESTABLISHED FOR THOSE CHARGED WITH DISPENSING JUSTICE

The California Supreme Court failed to recognize the depth and gravity of the prosecutor's conduct, and it's impact on petitioner's rights under the Due Process Clause of the Fifth and Fourteenth Amendments. Of great importance, too, is the failure of the California Supreme Court to grasp the consequences of the unconscionable precedent it set. The decision below not only denies petitioner a right to a fair trial and due process, it sends a clear message that prosecutors may ally themselves with members of the media during the pendency of cases they are assigned to prosecute, and may make arrangements with filmmakers to assist in the creation of motion pictures

about their cases. The California Supreme Court has sadly given its stamp of approval to such chicanery.

The arrangement between the prosecutor assigned to petitioner's case also violates the American Bar Associations Model Rules of Professional Conduct. Specifically, Rule 3.8, Special Responsibilities of a Prosecutor, states, in part, that a prosecutor shall,

> "except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this rule."

The significant national concern here and in Rule 3.8 is not just the intolerable potential for misconduct of a particular prosecutor, but the potential for all prosecutors similarly inclined, and the prejudicial pre-trial publicity which may result if this conduct is condoned. Even as early as 1966, this Court recognized that, "Given the pervasiveness of modern communications and the difficulty effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance

is never weighed against the accused . . . the cure lies in the remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences." *Sheppard v. Maxwell*, 388 U.S. 333, 362-363 (1966). The prosecutor's conduct represents the inception of the problem; disqualification is the only remedy.

The only rule which will protect petitioner and the criminal justice system is disqualification. Without a clear message, and in an era of increasing media technology, the conduct at issue here will recur. In order to prevent such disqualifying conduct, the cure lies at the source of the problem. Prosecutors, as well as defense attorneys, must be made to understand, clearly and unequivocally, that if they engage in conduct similar to that of the prosecutor here, they and their office will be relieved of their duties. The conduct should be considered inherently conflicted and disqualifying. Any other conclusion condones an improper alliance.

Petitioner recognizes that there is no precedent here, but given the likelihood of repetition, precedent should be set: prosecutors should not be permitted to ally themselves with film-makers to create and release nationally a major motion picture about a capital case yet to be tried. When prosecutors do so unethically and through illegal means, their conduct may not be condoned. That conduct represents such an affront the obligation of prosecutorial impartiality

that it creates a conflict of interest which mandates disqualification. The specific prosecutor's conduct must be imputed to his approving office, which also must be disqualified.

This Court is presented with an opportunity to establish an unwavering standard, setting an example for all involved in the prosecution and defense of those charged with crimes. Such an opportunity should not be lost.

CONCLUSION

This petition for a writ of certiorari provides an opportunity for this Court to protect petitioner's right to a fair trial and due process of law, and to establish the limitations expected by the criminal justice system and which will provide guidance to all involved in the prosecution of crimes within the United States.

This Court should grant the petition for a writ of certiorari and reverse the decision of the California Supreme Court.

Respectfully submitted,

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IN THE SUPREME COURT OF CALIFORNIA

JESSE JAMES HOLLYWOOD, Petitioner, v. THE SUPERIOR COURT OF SANTA BARBARA COUNTY, Respondent; THE PEOPLE, Real Party in Interest.	S147954 Ct.App. 2/6 B188550 Santa Barbara County Super. Ct. No. 1014465

Does a prosecutor's consulting with the makers of a major motion picture that is based on a criminal defendant's story create a conflict sufficient to require recusal of the prosecutor when the defendant is finally brought to trial? Here, the lead prosecutor, bent on tracking down the fugitive defendant in this capital case, gave his case files to a screenwriter/director to make a movie based on the defendant's alleged life and crimes and consulted with the filmmakers during its subsequent production. The defendant, Jesse James Hollywood, was ultimately captured in Brazil and extradited to the United States. He moved to recuse the prosecutor, arguing that the prosecutor's involvement with Hollywood, the film industry, precluded his prosecution of Hollywood, the capital defendant. The trial court found no conflict warranting recusal, but the Court of Appeal independently reviewed the record and granted

Hollywood's petition for a writ of mandate, with one justice explaining the prosecutor had permitted "'show business' to cast an unseemly shadow over this case."

In this case and its companion, *Haraguchi v. Superior Court* (May 12, 2008, S148207) ___ Cal.4th ___, we consider the extent to which prosecutorial involvement in cinematic and literary endeavors may give rise to conflicts requiring recusal, as well as the standard for reviewing whether the trial court erred in finding the existence or absence of a disqualifying conflict. We reject the Court of Appeal's conclusion that capital cases are sufficiently different from ordinary criminal cases that application of a higher standard of appellate scrutiny to recusal motions is required. Furthermore, as in *Haraguchi,* we reverse the Court of Appeal based on its failure to grant appropriate deference to the trial court's ruling and based on the presence in the record of evidence sufficient to support the trial court's conclusion that no disqualifying conflict existed and no unlikelihood of a fair trial had been proven.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from the kidnapping and murder of 15-year-old Nicholas "Nick" Markowitz. As did the Court of Appeal, we draw our description of the crime from the People's opposition to Hollywood's petition for a writ of mandate. Four people have been convicted or pleaded guilty in connection with the Nick

Markowitz murder, but Hollywood, of course, has not; thus, our recitation of his involvement is based on pretrial allegations.

According to the People, Hollywood was a drug dealer in the San Fernando Valley and Nick Markowitz's older half brother Ben one of his distributors. Ben and Hollywood had a falling out over money Ben owed Hollywood. Ben broke out the windows of Hollywood's residence. On their way to retaliate, Hollywood, Jesse Rugge, and William Skidmore spotted Nick on the street and kidnapped him, perhaps with the idea of extorting repayment from Ben.

Nick was held hostage for three days. At some point he was released from any physical restraints but did not flee. Hollywood eventually gave another confederate, Ryan Hoyt, a gun and orders to kill Nick. Hoyt and Graham Pressley dug a shallow grave in the foothills outside Santa Barbara. Hoyt and others then drove Nick into the foothills and marched him to the gravesite. Hoyt hit him over the head with a shovel, then shot him. The confederates buried Nick and returned to Santa Barbara.

Within days, Nick Markowitz's body had been found, and Hoyt, Rugge, Pressley, and Skidmore had been captured. Hollywood, however, became a fugitive.

In October 2000, the District Attorney of Santa Barbara County filed a two-count indictment against Hollywood, Hoyt, Skidmore, Rugge, and Pressley. Count 1 charged them with the murder of Nick

Markowitz. (Pen. Code, § 187, subd. (a).)[1] it alleged as a special circumstance that defendants had committed the murder during the commission of a kidnapping in violation of section 207. (§ 190.2, subd. (a)(17)(B).) Count 2 charged defendants with kidnapping Nick Markowitz for the purpose of ransom or to commit extortion in violation of section 209, subdivision (a). Santa Barbara County Deputy District Attorney Ronald Zonen prosecuted Hoyt, Skidmore, Rugge, and Pressley and obtained convictions or guilty pleas for each.[2]

In the spring of 2003, Zonen was contacted by Nick Cassavetes, a film director and screenwriter who wanted to make a film, Alpha Dog, based on the Markowitz murder. Cassavetes asked Zonen "if he could provide any assistance or materials to help create a screenplay, including trial transcripts, witness contacts, etc." According to Zonen, he decided to turn over materials to Cassavetes and act as a consultant in Cassavetes's preparation of Alpha Dog "in the hope that the publicity would result in Hollywood's apprehension."

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[1] All further unlabeled statutory references are to the Penal Code.

[2] Zonen elected to seek the death penalty only against Hollywood, the alleged ringleader, and Hoyt, the alleged actual killer. Hoyt was convicted of first degree murder and sentenced to death. Rugge, Skidmore, and Pressley were convicted of or pleaded guilty to varying lesser crimes.

In March 2005, Hollywood was captured in Brazil and extradited to the United States to be tried for kidnapping and special circumstance murder. Hollywood's defense learned of Zonen's cooperation with the Alpha Dog filmmakers and filed a motion to recuse both Zonen and the entire Santa Barbara County District Attorney's Office. Hollywood alleged Zonen's cooperation in the making of Alpha Dog created a conflict because (1) Zonen had acted illegally and unethically by disclosing confidential documents, including criminal records, police reports, and probation reports, to the filmmakers; and (2) by cooperating in the making of a movie that presented a distorted view of Hollywood, Zonen sought to burnish his own legacy (were he to later obtain Hollywood's conviction) and impaired Hollywood's opportunity to receive a fair trial.

The trial court held two lengthy hearings to examine these contentions. At the first, it announced its tentative conclusions that (1) Zonen had no financial conflict, as he had received no consideration for his cooperation; (2) Zonen's disclosure of confidential information, whether or not a legal or ethical breach, did not rise to the level of a conflict warranting recusal; and (3) Zonen's asserted interest in burnishing his legacy by raising the profile of the case did not amount to an impermissible conflict. Moreover, "even assuming one were to take the view there was a conflict," the trial court could "conceive of no likelihood that it would prevent [Hollywood] from receiving a fair trial." However, the trial court continued the

matter for an evidentiary hearing into whether Zonen might have acted improperly by ordering Michael Mehas, an associate producer who had interviewed numerous percipient witnesses while researching the film, not to cooperate with the defense.

At the evidentiary hearing, the trial court allowed the defense to examine Mehas extensively and also posed its own questions to determine what, if anything, Zonen might have done to interfere with the defense. At the close of the hearing, it concluded Mehas had elected to cease cooperation with the defense of his own accord, Zonen had not acted improperly, and the defense had failed to establish any conflict warranting recusal.

Hollywood filed a petition for writ of mandate with the Court of Appeal, which summarily denied relief. We granted review and transferred the case back to the Court of Appeal with directions to issue an order to show cause. After further briefing and argument, the Court of Appeal issued an opinion the same day as the companion case *Haraguchi v. Superior Court.* Emphasizing the unusual and distinctive facts of these cases, the Court of Appeal exercised its independent judgment and concluded: "In this first impression death penalty case we should not give our imprimatur to Zonen's conduct or embolden other prosecutors to assist the media in the public vilification of a defendant in a case which is yet to be tried. Perhaps without intending to do so, Zonen has potentially infected the jury pool with his views on the strength of the People's case. Prosecutors should try

their cases in courtrooms, not in the newspapers, television, or in the movies. . . . To say that Zonen went too far in his attempt to apprehend [Hollywood] is an understatement." On that basis, the Court of Appeal held "justice would not be served if Zonen remains as the trial prosecutor," but it denied recusal of the rest of the district attorney's office.

We granted review in this case and in *Haraguchi* to consider both the standard of review and its application to prosecutorial recusal motions based on literary or cinematic endeavors.

Discussion

I. *Standards for a Motion to Recuse*

As we explained in *Haraguchi v. Superior Court, supra,* ___ Cal.4th at page ___ [at p. 5]: "Section 1424 sets out the standard governing motions to recuse a prosecutor: such a motion 'may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial.' (*Id.,* subd. (a)(1).) The statute 'articulates a two-part test: "(i) is there a conflict of interest?; and (ii) is the conflict so severe as to disqualify the district attorney from acting?"' (*Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 833, quoting *People v. Eubanks* [(1996)] 14 Cal.4th [580,] 594.)" In *Haraguchi,* we also reaffirmed the general rule that motions to recuse a prosecutor are reviewed for an abuse of discretion. (*Haraguchi v. Superior Court,* at pp. ___ [at pp. 5-8].)

The Court of Appeal in this case gave no deference to the trial court's findings of fact or its application of the law to those facts. Having rejected in *Haraguchi* two arguments the Court of Appeal offered there in support of independent review – that cases of first impression warrant heightened scrutiny, and appellate courts have an independent interest in policing error pretrial – we consider here an additional argument for more stringent review offered by the Court of Appeal: potential capital cases like this one should be treated differently.

The Court of Appeal noted the United States Supreme Court's oft-quoted aphorism, "[D]eath is different." (*Gregg v. Georgia* (1976) 428 U.S. 153, 188 (lead opn. of Stewart, J.); accord, e.g., *Ring v. Arizona* (2002) 536 U.S. 584, 606; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994; *Ford v. Wainwright* (1986) 477 U.S. 399, 411; *Gardner v. Florida* (1977) 430 U.S. 349, 357 (plur. opn. of Stevens, J.).) We do not disagree. But the conclusion the Court of Appeal drew – that this difference compels a different standard of review for such cases – is incorrect.

We have consistently reviewed trial court rulings on recusal motions under the abuse of discretion standard even in automatic appeals from death sentences, albeit without expressly considering whether the punishment imposed might on some theory warrant more stringent review. (See, e.g., *People v. Griffin* (2004) 33 Cal.4th 536, 568-570; *People v. Millwee* (1998) 18 Cal.4th 96, 122-125; *People v. Zapien* (1993) 4 Cal.4th 929, 968; *People v.*

Breaux (1991) 1 Cal.4th 281, 293-295; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1154-1156.) Today, we expressly hold the abuse of discretion standard is the proper one for prosecutorial recusal motions, even in capital cases.

Our criminal justice system strives in each case to afford defendants procedurally fair trials while arriving at empirically correct outcomes, convicting the guilty and absolving the innocent. (See *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266 [the prosecutor is "'the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer'" (quoting *Berger v. United States* (1935) 295 U.S. 78, 88)].) The punishment at issue in capital cases makes it all the more important to ensure fairness and arrive at accurate outcomes. But nothing in the Court of Appeal's proposed de novo standard of review promotes those twin goals. For recusal motions in noncapital cases, we give trial courts primacy in fact finding and in assessing whether and how great a conflict exists not because the stakes are less and errors more conscionable, but because our trial courts are genuinely in the best position "to assess witness credibility, make findings of fact, and evaluate the consequences of a potential conflict in light of the entirety of a case, a case they inevitably will be more familiar with than the appellate courts that may subsequently encounter the case in the context of a few briefs, a few minutes of oral argument, and a cold and often limited record." (*Haraguchi v. Superior Court, supra,* ___ Cal.4th at p. ___ [at p. 7].) Nothing

about these circumstances suggests to us that de novo review of recusal motions in capital cases would increase either the accuracy or the fairness of these proceedings. The same point answers the Court of Appeal's concern about reducing the likelihood of belated reversal later on in the lengthy capital appeal process; we have no basis on which to conclude independent review would reduce the risk of error. We therefore conclude that in capital cases, as in all others, the trial courts' rulings should be reviewed only for an abuse of discretion.[3]

II. *Application*

We further consider whether the trial court erred in finding no conflict or whether the Court of Appeal erred in reversing based on its independent view that in fact the lead prosecutor should have been recused. Here, we have the reverse of the *Haraguchi* circumstances: a fictional account that *was* intimately tied to and directly based on the prosecution at issue, but

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[3] As an alternate ground for independent review, Hollywood contends the trial court in this case committed a litany of errors in evaluating the evidence and applying the law. The conduct of a trial court in an individual case is no answer to the institutional concerns that have led us to adopt abuse of discretion as the appropriate standard of review. Moreover, abuse of discretion review is not equivalent to no review; in cases where a trial court's errors truly are as egregious as Hollywood claims them to be here, reversal would be mandated even under deferential review.

in which the challenged prosecutor had no financial interest.

In the trial court and on appeal, Hollywood has identified as a source of conflict (1) Zonen's actions in disclosing confidential information, (2) his cooperation in the distribution of an allegedly inflammatory portrayal of Hollywood, (3) incidental future benefits to Zonen arising from the distribution of Alpha Dog, and (4) the totality of the circumstances. We consider each in turn.

A. *Disclosure of Prosecutorial Documents*

Zonen concedes that in the course of assisting the Alpha Dog filmmakers, he gave them materials from his *Hollywood* case file and from the case files of the four completed prosecutions. Filmmaker Cassavetes described the materials turned over as "voluminous." The trial court assumed for purposes of its ruling that everything in the case files for the completed prosecutions was made available.

Crediting Zonen's statements, the trial court concluded that if Zonen disclosed any confidential documents, such disclosures were inadvertent and at most negligent, not intentional. The trial court was entitled to credit Zonen, and his statements constitute substantial evidence. The trial court declined to make findings on the further question whether

Zonen's disclosure of documents in fact involved any Penal Code violations.[4]

Violations of the law regarding dissemination of confidential records are sanctionable and may result in criminal prosecution and punishment. (See, e.g., §§ 11105, 11140-11144 [regulating dissemination of criminal records and making unlawful dissemination a misdemeanor], 1203.05 [regulating dissemination of probation reports].) Recusal is also an available sanction. Hollywood argues that if zeal within legal limits does not amount to a recusable conflict, as we have said (*Hambarian v. Superior Court, supra,* 27 Cal.4th at p. 843), then zeal that exceeds legal limits perforce must amount to a conflict *requiring* recusal.

We disagree. While recusal may be available in cases where there has been an illegal disclosure of confidential documents, it is not mandatory. Rather, recusal is appropriate if and only if, as we have framed the test, the disclosure gives rise to a conflict "'"so grave as to render it unlikely that defendant

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[4] On a related point, after listening to extensive testimony from Mehas, the trial court made an express finding that Zonen had not attempted to dissuade him from cooperating with the defense, concluding instead that Mehas had unilaterally elected to cease cooperation because he felt bad about putting Zonen in an awkward situation. In his briefing to this court, Hollywood persistently asserts that Zonen acted improperly by dissuading a witness, without acknowledging the trial court's contrary factual finding or offering any argument as to why that finding is unsupported by substantial evidence. In the absence of any such argument, we accept the trial court's finding.

will receive fair treatment."'" (*People v. Vasquez* (2006) 39 Cal.4th 47, 56.) Thus, it is for the trial court in the first instance to consider whether the fact of disclosure and its collateral effects (such as, for instance, a fear of being personally prosecuted) are likely to affect the challenged prosecutor's ability to exercise discretionary functions in an evenhanded fashion and render a fair trial unlikely.

The trial court focused on that precise question, repeatedly asking Hollywood's counsel to explain how, if indeed Zonen had committed legal breaches, they might create a conflict for him and deprive Hollywood of a fair trial.[5] In the end, the trial court was not persuaded that the disclosures did create any conflict. Reviewing for an abuse of discretion, we agree. While in the abstract it is conceivable a fear of criminal sanctions might alter how Zonen handled this case, the trial court found Zonen credible and concluded the possibility that confidential documents might have been disclosed inadvertently would not prevent Zonen from acting fairly toward Hollywood. That

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[5] At the first hearing, the trial court asked: "The question is, did any of the documents being turned over to the filmmakers prevent your client from having a fair trial? And if so, how?" At the second hearing, it inquired again: "But whether inadvertent or negligent, what I'm interested in is why the turning over of that information, one, is a conflict, and, two, prevents your client from having a fair trial. [¶] I mean, we haven't even addressed the second point, which is how the turning over of . . . information in police reports for the purposes of attempting to create an accurate portrayal of people involved in a crime[,] how that would prevent your client from having a fair trial."

conclusion does not appear arbitrary or capricious and is supported by substantial evidence.

In adopting the contrary view, the Court of Appeal neither explained how the disclosure of documents created a conflict nor how such a conflict might deprive Hollywood of a fair trial. Instead, it appears to have reasoned that Zonen committed misconduct and for that reason alone should have been removed as prosecutor. Putting aside for the moment the absence of any trial court finding that Zonen committed misconduct, we emphasize that recusal motions are not disciplinary proceedings against the prosecutor. The ultimate focus of the section 1424 inquiry is on protection of the defendant's rights, not whether recusal may be just or unjust for the prosecutor. Thus, in some cases a prosecutor may have committed misconduct but not be subject to recusal because the misconduct does not impair the defendant's right to a fair proceeding; in other cases, a prosecutor may commit no misconduct but nevertheless be subject to recusal because a conflict, through no fault of the prosecutor's, jeopardizes the defendant's rights. Here, the trial court could conclude that even if there was misconduct, it did not deprive Hollywood of his right to a fair trial. Under the circumstances, that ruling was not an abuse of discretion, and we defer to it on appeal.

B. *Distribution of a Motion Picture Reflecting the Prosecution's View of This Case*

Next, Hollywood contends it was misconduct for Zonen to cooperate in the dissemination of a major motion picture that would convey his (distorted, according to Hollywood) view of Hollywood.[6] The

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[6] Since the trial court decided the motion to recuse, and over Hollywood's efforts to have distribution enjoined, Alpha Dog has been released. (Alpha Dog (Universal Studios 2007); see *Hollywood v. Universal Studios, Inc.* (C.D.Cal., Dec. 12, 2006, Case No. CV 06-6849-RGK (RCx)) order, pp. 2-4 [denying injunction on First Amendment grounds].) On our own motion, we have taken judicial notice of the fact of its release.

The precise content of the film was not before the trial court, nor is it particularly relevant to the recusal motion. The trial court assumed for purposes of its decision that while Zonen cooperated with the intent that the filmmakers make and distribute an accurate portrayal of Hollywood, his view of the facts and of Hollywood might legitimately vary widely from the defense's. The trial court thus did not take issue with defense counsel's representation that some moviegoers thought Hollywood was portrayed as a "monster." Similarly, we do not consider whether the portrayal of Hollywood as "Johnny Truelove" in Alpha Dog is accurate; for purposes of the recusal motion, we may assume, as the trial court did, that the film hews closely to the prosecution's view and is considerably at odds with the defense's view. Accordingly, and because the film was not part of the trial court record at the time of the trial court's decision, we have denied Hollywood's motion to augment the record with a copy of the film itself. (See *People v. Tuilaepa* (1992) 4 Cal.4th 569, 585 [augmentation and like procedures "are intended to ensure that the record transmitted to the reviewing court preserves and conforms to the proceedings actually undertaken in the trial court"]; Cal. Rules of Court, rule 8.155.)

Court of Appeal likewise criticized Zonen for trying his case in the movies.

While the prosecution ethically may discuss information necessary to aid in the apprehension of fugitives (Rules Prof. Conduct, rule 5-120(B)(7)(b)), its freedom to do so is not without limits. Certainly, a case might arise in which a trial court could order recusal based on the prosecution's attempt to manipulate the prospective jury pool by disseminating inflammatory portrayals of the defendant. (See *id.*, rule 5-120(A) [attorney may not make extrajudicial statements he or she "reasonably should know . . . will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter"].)

However, the trial court found this was not that case, concluding that (1) Zonen's cooperation came before Hollywood had been captured and was solely motivated by his desire to have Hollywood captured so he could be tried in a court of law, and (2) Zonen sought throughout to have Hollywood portrayed in as *accurate* a fashion as possible. Each of these conclusions is supported by substantial evidence. Zonen declared under oath that Hollywood's capture was his sole motivation, and indeed Hollywood and the Court of Appeal both agreed that it was at least his principal motivation. Zonen declared that he sought to have Hollywood portrayed accurately; likewise, Hollywood himself submitted a videotape in which Mehas, leaving a 2003 meeting with Zonen, reported Zonen had told the filmmakers he wanted them to make the

movie as accurate as possible. The trial court expressly credited these uncontradicted statements.

Of course, as the trial court recognized, Zonen's views on what constitutes an "accurate" portrayal of Hollywood might vary widely from those of defense counsel. In a criminal case where the defendant is charged with capital crimes, this is wholly unsurprising. Equally important to remember is that at the time Zonen made his remarks, he *had* no case. Hollywood had successfully vanished into thin air; for years he had eluded extensive attempts by law enforcement to locate him, and the trail had gone cold. The trial court concluded Zonen was only conveying his honest assessments of a fugitive defendant to Cassavetes and others in the hope their subsequent portrayal would lead to the fugitive's capture, and his doing so did not create a conflict. On this record, it was not an abuse of discretion to so conclude.

We note as well that if in fact the jury pool in this case has been affected in any way by the release of Alpha Dog, this is a matter that can be handled during voir dire through the close questioning of individual prospective jurors. (See *Haraguchi v. Superior Court, supra,* ___ Cal.4th at p. ___ [at p. 16].) This case is not the first in which pretrial publicity may create an issue with respect to ensuring a fair trial for the defendant, nor is it the first in which one side or the other may be inordinately responsible for

that publicity.[7] In many or most such cases, measures short of recusal will suffice to address any such fairness issues and ensure the defendant's rights are protected. Motions to recuse are directed to the trial court's discretion in part because the trial court is in the best position to assess in the first instance whether it can handle pretrial publicity issues with such lesser measures. If a trial court believes it can, it should do so, as we trust the trial court will here on remand.

C. *Future Benefits to Zonen from the Release of Alpha Dog*

The trial court found Zonen had no *present* financial interest in Alpha Dog; while he was a consultant, he was not compensated in any way for his assistance. Hollywood contends, however, that by contributing to Alpha Dog, Zonen intended to create the prospect of tangible or intangible future benefits; he elevated the profile of a case he purportedly considers his "legacy," put himself in a position to garner additional laurels and plaudits, and, perhaps, expanded the market for a book of his own based on this case. Thus, according to Hollywood, "[f]uture profit may be implied."

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[7] In truth, that either side is inordinately responsible here is not entirely clear. Jack Hollywood, Jesse James Hollywood's father, was also a paid consultant in the making of Alpha Dog.

As discussed, however, the trial court concluded Zonen's sole interest in cooperating with the Alpha Dog filmmakers was to enhance the likelihood of the fugitive Hollywood's capture. While Hollywood disputes that conclusion, it is supported by substantial evidence. (See *ante,* p. 13.) Additionally, Mehas testified that Zonen had decided to shelve, for now, any plans for a book because of his belief that it might pose a conflict of interest problem. Hollywood acknowledges as much on appeal.

Consequently, as the trial court found, Zonen is left with the same interest in burnishing his legacy that every attorney has in a high-profile case – indeed, that every attorney on both sides in this case has. Success in high-profile cases brings acclaim; it is endemic to such matters. Moreover, if the high-profile nature of a case presents incentives to handle the matter in any way contrary to the evenhanded dispensation of justice, the problem is not one recusal can solve, as the same issue would arise equally for any theoretical replacement prosecutor. In such matters, we must rely on our prosecutors to carry out their fiduciary obligation to exercise their discretionary duties fairly and justly – to afford every defendant, whether suspected of crimes high or petty, equal treatment under the law. (See *People v. Hill* (1998) 17 Cal.4th 800, 847 ["Our public prosecutors are charged with an important and solemn duty to ensure that justice and fairness remain the touchstone of our criminal justice system. In the vast majority of cases,

these men and women perform their difficult jobs with professionalism, adhering to the highest ethical standards of their calling"]; Corrigan, On Prosecutorial Ethics (1986) 13 Hastings Const. L.Q. 537, 537 ["The first, best, and most effective shield against injustice for an individual accused, or society in general, must be found not in the persons of defense counsel, trial judge, or appellate jurist, but in the integrity of the prosecutor"].) The trial court recognized as much and denied recusal on this basis.

D. *The Totality of the Circumstances*

In the end, we view Hollywood's arguments for recusal as resting primarily on the totality of the circumstances. The Court of Appeal shared this view; it ultimately agreed that this case was sui generis, that Zonen's conduct when viewed in its entirety was wholly inappropriate, that he had created serious problems for the prosecution of the case, and that the only sufficient remedy was to order his recusal.[8]

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[8] As an aside, we note legitimate reasons exist to question whether recusal would solve the problems the Court of Appeal perceived. For example, the Court of Appeal was concerned that Zonen's disclosure of his case file might have waived prosecutorial work product privileges that would otherwise attach. (See Code Civ. Proc., § 2018.030; *People v. Collie* (1981) 30 Cal.3d 43, 59.) If so, however, the bell has been rung; recusal does not solve this problem, which persists whether Zonen is recused or not.

The Court of Appeal assumed Zonen's actions were the product solely of zeal, but expressed the view that Zonen had gone too far in his efforts to apprehend Hollywood. Perhaps so. But section 1424 does not exist as a free-form vehicle through which to express judicial condemnation of distasteful, or even improper, prosecutorial actions. As we have previously held, and as we reiterate today in the companion case *Haraguchi v. Superior Court,* section 1424 offers no relief for actions simply because they appear, or are, improper. (*Haraguchi v. Superior Court, supra,* ___ Cal.4th at p. ___ [at pp. 16-17]; *People v. Eubanks, supra,* 14 Cal.4th at pp. 591-592.) The Legislature has closely defined the limits of judicial authority to recuse prosecutors, and we must observe them.[9] We do so here. A defendant must identify, and a court must find, some *conflict of interest* that renders it unlikely defendant will receive a fair trial. The trial court found no such conflict, and the Court of Appeal identified no specific conflict either, instead offering its "considered judgment" that "justice would not be served" if Zonen were permitted to remain. Section 1424 requires more.

This is not to say that Zonen can or should escape censure. We find his acknowledged actions in

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[9] Hollywood does not press, and we therefore need not address, any claim that recusal is required here to preserve his constitutional due process rights. (Cf. *People v. Vasquez, supra,* 39 Cal.4th at pp. 58-66.)

turning over his case files without so much as an attempt to screen them for confidential information highly inappropriate and disturbing. The trial court made no findings as to whether this omission in fact resulted in the illegal or unethical disclosure of confidential documents, and we certainly are not situated to do so here. If it did result in such a disclosure, sanctions are available, as are authorities whose function it is to pursue those sanctions. We hold only that on the record here, it was not an abuse of discretion for the trial court to conclude Zonen did not labor under any conflict and, accordingly, his recusal under section 1424 was not appropriate.[10]

DISPOSITION

For the foregoing reasons, we reverse the Court of Appeal's judgment and remand this case for further proceedings consistent with this opinion.

WERDEGAR, J.

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[10] Because the record supports the trial court's conclusion there was no cognizable conflict, we need not address its further conclusion that any theoretical conflict was not so grave as to render a fair proceeding unlikely. Moreover, because the trial court permissibly could find there was no conflict, we need not address in any detail Hollywood's contention that the entire Santa Barbara County District Attorney's Office should have been recused. In the absence of a conflict, it was not error to deny recusal of either Zonen or the entire office.

WE CONCUR:

GEORGE, C. J.
KENNARD, J.
BAXTER, J.
CHIN, J.
MORENO, J.
CORRIGAN, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JESSE JAMES HOLLYWOOD, Petitioner, v. SUPERIOR COURT FOR THE STATE OF CALIFORNIA, FOR THE COUNTY OF SANTA BARBARA, Respondent. THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	2d Crim. No. B188550 (Super. Ct. No. 1014465) (Santa Barbara County) (Filed Oct. 5, 2006)

This is a companion case to *Haraguchi v. Superior Court* (Oct. 5, 2006, No. B191161) (*Haraguchi*). In this death penalty case, Jesse James Hollywood, petitioner, seeks a writ of mandate directing the respondent trial court to grant his motion to recuse the Office of the District Attorney of Santa Barbara County. In the alternative, petitioner seeks a writ of mandate directing the trial court to conduct a full evidentiary hearing on the recusal motion. Petitioner contends that, because of the role of the assigned prosecutor's, Ronald J. Zonen's (Zonen), role in the

making of a film about the case, "that prosecutor has demonstrated a bias and conflict of interest warranting recusal." "Based on the lack of evidence that [the District Attorney] was unaware of the prosecutor's disqualifying conduct," petitioner also contends that the entire prosecutorial office should be recused.

We originally summarily denied the petition. The Supreme Court granted review and directed us to issue an order to show cause. We now conclude that the trial court erred by denying the recusal motion as to Zonen, but correctly denied recusal as to the entire Santa Barbara District Attorney's Office.[1]

Factual and Procedural Background

On October 30, 2000, the District Attorney of Santa Barbara County (hereafter District Attorney) filed a two-count indictment against petitioner and four codefendants: Ryan Hoyt, William Skidmore, Jesse Rugge, and Graham Pressley. Count 1 charged them with the murder of Nicholas Markowitz. (Pen. Code, § 187, subd. (a).)[2] It alleged as a special circumstance that the defendants had committed the murder during the commission of a kidnapping in violation of section 207. (§ 190.2, subd. (a)17(B).)

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[1] One of the reasons we originally denied the petition was because it prayed for recusal of the entire District Attorney's Office.

[2] All statutory references are to the Penal Code unless otherwise stated.

Count 2 charged the defendants with kidnapping Markowitz for the purpose of ransom or to commit extortion in violation of section 209, subdivision (a).

In their return to the order to show cause, the People summarize the facts underlying the crimes as follows:

"In brief, evidence before the grand jury revealed that Petitioner . . . was a drug dealer in the San Fernando Valley area of Los Angeles and Ben Markowitz ('Ben,' the older half-brother of 15-year-old Nicholas 'Nick' Markowitz) was one of [petitioner's] distributers [*sic*] for several years. Ben and [petitioner] had a falling-out over a debt Ben owed [petitioner] from the sale of a quantity of 'ecstacy' [*sic*] supplied by [petitioner], and the enmity between them escalated.

"On Sunday, August 6, 2000, [petitioner], Jesse Rugge . . . and William Skidmore . . . were driving in a van to the home of Ben Markowitz's parents in the San Fernando Valley, intending to break out the windows of that residence in retaliation for Ben's act of breaking the windows of [petitioner's] residence. On the way they spotted Nick Markowitz standing on a street corner near his home. They stopped and forced the boy into the van. They then proceeded, with Nick in their custody, to the home of a friend to pick him up for a pre-arranged trip to Santa Barbara, to attend the annual 'Fiesta' celebration in that city and to 'party' there.

"On the way to Santa Barbara, [petitioner] made threats to Nick Markowitz, such as, 'If your brother thinks he's going to kill my family, he has another think coming. Your brother is going to pay me money right now,' and 'If you run, I'll break your teeth.'

"Nick Markowitz was detained in the Santa Barbara home of Richard Hoeflinger, another friend of [petitioner's]. Initially, Nick was bound hand and foot with duct tape and was blindfolded. He later was freed of those restraints but remained with Rugge and Pressley, either out of fear or in the belief he was not in personal danger as long as he did as he was told.

"On Tuesday, August 8, 2000, Rugge, with Nick in tow, rented a room at a motel in Santa Barbara. In Los Angeles, [petitioner] gave Hoyt a Tec-9 automatic machine pistol and sent him back to Santa Barbara with instructions to kill Nick Markowitz. Hoyt and Pressley first drove up Highway 154 to a trailhead called 'Lizard's Mouth' atop the mountains separating Santa Barbara and the Santa Ynez Valley and dug a shallow grave. Late that evening, Rugge, Pressley, Hoyt and Skidmore drove young Markowitz to the trailhead and marched him to the gravesite. He was bound with duct tape and blindfolded. Hoyt hit him over the head with a shovel and then shot him with a nine round burst from the Tec-9. Hoyt and Rugge buried him and the four defendants returned to Santa Barbara."

On August 12, 2000, Markowitz's body was discovered by law enforcement officials. Within 48 hours after the discovery, petitioner's four codefendants (Hoyt, Skidmore, Rugge, and Pressley) were in custody. Petitioner, on the other hand, became a fugitive. He was arrested in Brazil in March 2005 and deported to the United States.

Petitioner's codefendants were prosecuted by Zonen. In March 2003, after Zonen had obtained convictions against all four codefendants, he was contacted by Nick Cassavetes. Cassavetes was a film director and screen writer who wanted to make a film, "Alpha Dog," based on the Markowitz murder. Cassavetes asked Zonen "if he could provide any assistance or materials to help create a screenplay, including trial transcripts, witness contacts, etc." According to Zonen, he "agreed to turn over materials . . . to Nick Cassavetes and act as a consultant in Mr. Cassavetes' preparation" of Alpha Dog.

Declarations In The Recusal Moving Papers

Zonen stated that "the Court should assume that all relevant material in the case against [petitoner] was turned over to the film makers [*sic*], including all reports, tapes and photos." Zonen further stated that all of those materials "are already in [petitioner's] possession, or will soon be. . . . " The disclosed materials included both police and probation reports. The police reports contained the names, phone numbers, and addresses of witnesses. Zonen may

have unintentionally disclosed "rap sheets" containing criminal offender record information. Zonen declared that he gave boxes of materials to the filmmakers and "would not have turned over rap sheets if [he] had known they were in the boxes."

Zonen never asked for and was not given any monetary consideration for his assistance. Zonen declared that he decided to cooperate with Cassavetes because he believed Alpha Dog would be "the last opportunity to get the kind of widespread publicity necessary to locate [petitioner] and bring him to justice." Zonen stated: "I asked only that [petitioner's] picture be shown at the conclusion of the film along with a phone number to call with information as to his whereabouts. I asked that the audience be told that [petitioner] remains a fugitive and that there is a reward for his arrest." Zonen also asked "that the film be accurate."

Zonen declared that he had been informed that the film "would be a realistic recounting of the crime, with real names and accurate facts, to be shown nationally and internationally." He believed that "[t]he national and international forums were important, given that it was likely that [petitioner] had fled the country and was beyond the reach of conventional American television." However, after Zonen had given the case materials to Cassavetes, he was informed that "the names and locations would be changed because of liability concerns and difficulty in obtaining insurance." Petitioner's name in the movie is "Johnny Truelove." At the end of the movie, a caption

states that Truelove "was finally arrested in 'Paraguay' after five years as a fugitive and is waiting trial in 'California.'"

Cassavetes declared: "The 'Alpha Dog' movie could have been made without Mr. Zonen's cooperation, but it would have been made worse. Either I would have had to go around him and do a lot more diligent work or I would have had to make it up. This particular version could not have been made." Zonen took Cassavetes and his assistants to the location where the murder of Markowitz had occurred. Zonen helped Cassavetes contact witnesses. Cassavetes asked Zonen for "his opinions on certain participants in the case." Cassavetes "specifically recall[ed] Mr. Zonen describing . . . Ryan Hoyt's family life and Ryan Hoyt's mother." Zonen "told [Cassavetes] overall he felt that these were a bunch of stoned, dumb guys." Cassavetes "[a]t times . . . used Mr. Zonen's assistance . . . for his opinions of character specifics."

According to Cassavetes, Zonen "was cooperative" and never "said 'no' to any request [he] made." Cassavetes characterized Zonen's "attitude towards [him] and the creation of the movie as enthusiastic."[3] Heather Wahlquist, who assisted in the creation of

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[3] Cassavetes also declared that he did discuss the case with sheriff's deputies but they " . . . did not help me much. They tended to be more closed mouthed. They stated they did not want to compromise any future case." If only Zonen had entertained a similar view.

Alpha Dog, declared that Zonen appeared "to be 'star-struck' and eager to assist the film-makers."

Cassavetes also declared that, during his first meeting with Zonen, Zonen "said he was very interested in finding [petitioner]. He asked whether [Cassavetes] intended to identify [petitioner] at the end of the film and if [Cassavetes] intended to show his photograph. Mr. Zonen never requested that [Cassavetes] do so." Cassavetes "told [Zonen he] was just the writer, that no film was yet made, and that there were no plans whatsoever. [Cassavetes] also informed him that [Cassevetes] was not interested in making a 90[-]minute version of 'America's Most Wanted.'"[4]

The Motion to Recuse

On September 9, 2005, petitioner filed a motion to recuse the entire District Attorney's Office. In support of the motion, petitioner's counsel declared that, on August 23, 2005, he had attended "the first and only public screening to date" of Alpha Dog. Counsel alleged that the film portrays petitioner "in an extremely inflammatory manner, [as] extremely manipulative, vicious, selfish, and without any redeeming character traits whatsoever. The Jesse

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[4] According to Zonen, "[t]he television program 'America's Most Wanted' featured [petitioner] on nine of its shows between 2000 and 2003." Zonen assisted "the producers of . . . 'America's Most Wanted' by giving them information about the crime in the hope that the publicity would result in [petitioner's] apprehension."

James Hollywood Character was described by several of the public movie viewers as a 'monster.'" At the conclusion of the film, special thanks are given to the Santa Barbara Sheriff's Department and to Ron Zonen.

Petitioner's counsel also declared that Michael Mehas, a researcher and associate producer for Alpha Dog, had refused to speak with him because of Zonen's interference. According to counsel, Mehas was the "film-maker who had the greatest amount of contact with . . . Zonen." Counsel stated that Mehas had initially provided information about his contacts with Zonen. Mehas "described his access, with permission, to the Santa Barbara District Attorney's Office file room where all the case materials were located. [Mehas] stated he was provided access to computer disks, photographs, audio recordings, video recordings, still photographs, law enforcement evaluations, probation reports, and criminal history reports, among other items of evidence. [Mehas] stated these items of evidence were stored in boxes, which he was permitted to remove without supervision from the Santa Barbara District Attorney's Office[.]" The materials received by Mehas included "a psychological report regarding co-defendant Hoyt." In addition, Zonen gave Mehas "Zonen's trial notebook for the prior trial of the co-defendants charged herein. This notebook includes witness statements, prosecutorial impressions, and Mr. Zonen's handwritten notes."

Petitioner's counsel declared that Mehas's cooperation with the defense ceased after Zonen telephoned him and "expressed anger that Mr. Mehas had spoken to counsel." Zonen "also expressed concern that he would be criminally prosecuted for his conduct, and that the information Mr. Mehas provided could assist in that prosecution."

Petitioner contended "that the prosecutor's unprecedented misconduct in acting as a 'consultant' to film-makers and providing them with unfettered access to his files and evidence qualifies as conduct warranting disqualification." Petitioner argued that "the prosecution's misconduct can only be described as representing a bias against [petitioner]." "The pretrial publicity in which the prosecution engaged cannot be credibly characterized as the dissemination of 'information necessary to aid in the apprehension' of a fugitive . . . ; it serves solely to create an inflammatory and prejudicial depiction of [petitioner] and to aggrandize the prosecution." Petitioner requested that the trial court conduct an evidentiary hearing "regarding the full nature and extent of the prosecution's 'consultation' as well as the specific details regarding improper dissemination of 'relevant materials.'"

Hearing on the Motion to Recuse

On November 1, 2005, the trial court conducted a hearing on the recusal motion. Petitioner conceded that there was not "any impropriety in reference to

finances." The trial court accepted Zonen's explanation for assisting the filmmakers: "There is no declaration from any person, in my view, that undermines, or raises any question about Mr. Zonen's assertion and declaration that his sole interest in providing information to the filmmakers was to promote the interests of law enforcement in apprehending [petitioner]. That interest is obviously a lawful and justifiable interest and creates no legal conflict of interest." The court further stated: "There's a suggestion that . . . Mr. Zonen might have been star struck by his association with the filmmakers, or that he took some psychic pleasure in assisting in the production of a movie. Even assuming that that's true, . . . I don't see that that's a legally cognizable conflict." "Finally, even assuming one were to take the view that there was a conflict, I can conceive of no likelihood that it would prevent the [petitioner] from receiving a fair trial."

The trial court stated that it had viewed a digital video disc made by the filmmakers. The disc shows the filmmakers conversing among themselves immediately after their first meeting with Zonen. One of the filmmakers stated, "[Zonen] wants you to make this movie and he wants you to make this movie as accurate as you can so he can portray [petitioner] for what he is so that he can catch that bastard." The trial court said that the filmmaker's statement "corroborates what Mr. Zonen has been saying in his declarations, which is not really controverted by anything in the defense's declarations." On the disc

the filmmaker also said that Zonen had stated: "I'm retiring in seven years. I've got to get this guy before I go."

At the end of the disc, a filmmaker (apparently Cassevetes) said that Zonen had stated that "anything that we needed he would give us but we have . . . to come to the Markowitz woman [Susan Markowitz, the victim's mother] first . . . and if anything came out I have to say that the Markowitz woman told me." The trial court asked Zonen to explain the filmmaker's comment. Zonen said, "I don't remember a conversation where we talked about crediting information to Susan Markowitz." However, "if there's information that would have come from both of us I could very well have said, '*Credit it to Susan Markowitz.*' I prefer not to be quoted. . . . [¶] . . . I would not have told them to quote her something she knew nothing about, that would have been foolish."

The court decided to conduct an evidentiary hearing, but it limited the scope of that hearing to the issue of whether Zonen had improperly influenced Mehas's decision to stop talking to the defense. The court declared: "Only one movie person has been identified . . . as now being unwilling to talk to the defense, and the timing of that is such that it raises a concern in the Court's mind." "And so it seems to me that a limited evidentiary hearing with Mr. Mehas as a witness is relevant to the question of whether or not there's been some improper coercion which might in turn reflect a bias that would be legally significant."

Mehas testified at the evidentiary hearing. His testimony was as follows: He was involved in two projects. The first project was to assist Cassavetes in writing the screenplay for Alpha Dog. The second was to write a book on the Markowitz murder. Zonen told Mehas that he planned to write a book as well. Later, however, Zonen said that "he couldn't do a book, that it would be improper with . . . [petitioner's] case still outstanding. . . . "

Mehas met with Zonen approximately 10 to 12 times over a two-year period. Mehas would come into Zonen's office and "pepper him with questions." "[Mehas] would give him [Mehas's] theories of what happened, [Zonen] would give [Mehas] his theories, [and Mehas would] tell [Zonen] why [he] thought [Zonen's theories were] wrong." Mehas considered Zonen to be a "friend."

There was an understanding between Zonen and Mehas that Mehas would disclose the case materials only to persons working with him on the film. It was also understood that Mehas "wouldn't talk about any of the stuff [he] got from [Zonen]." He would not "even tell people that [Zonen] had turned those documents over to [him]. . . . "

After petitioner was apprehended, Mehas had two telephone conversations with Zonen. During the second conversation, Zonen asked if he had given rap sheets to Mehas. Mehas believes he told Zonen that he had rap sheets, but "when [he] went through everything [he] didn't have the rap sheets." Zonen

"said that he was concerned that [he] would be criminally prosecuted because of allegedly giving [Mehas] documents that he shouldn't have." Zonen never told Mehas not to cooperate with petitioner's counsel or anyone associated with petitioner. Nor did he tell Mehas "not to reveal to anyone any of [Mehas's] prior conversations with [Zonen]."

Petitioner's counsel asked Mehas for a declaration "as to what transpired between [him] and Mr. Zonen." Mehas refused to give a declaration for two reasons. First, Mehas was concerned that he would be "breaching a moral and ethical confidentiality that [he] had personally with [Zonen]." Mehas stated: "I never wanted to give [counsel] a declaration and never wanted to testify because of my personal, ethical and moral considerations in dealing with a professional attorney on this matter. . . . I was concerned about the information I was getting, and I told [Zonen] that I was going to keep it under my hat."

The second reason for Mehas's refusal to give a declaration was that, after his telephone conversations with Zonen, he was concerned that Zonen "was going to be facing criminal prosecution for this matter." Zonen's potential criminal liability was the "foremost factor" in Mehas's decision not to give a declaration. It "nailed [his] mouth shut." Mehas was concerned that "if [he] cooperated further with the defense in reference to a declaration that it might harm Mr. Zonen." He was also "concerned about [himself] . . . at that point."

Mehas interviewed approximately eight witnesses and made notes and tapes of the interviews. Both before and after the interviews, Mehas discussed the witnesses with Zonen. Mehas told Zonen that he would keep these discussions confidential. Mehas did not disclose to Zonen the information he had obtained during the witness interviews: "I wouldn't tell [Zonen] I had a conversation with a witness and then relay that information to him. I didn't give him that information."

Mehas refused to turn over to the defense his notes and tapes of witness interviews "[b]ecause that is my work product and is going into my book and that's the only place it's going to come out at." The trial court directed Mehas to turn over to the court his notes and tapes of witness interviews. It assured Mehas that the notes and tapes "will be held by the Court, not disclosed to any third person until we have a hearing on this issue and until you're represented by counsel." The court directed Mehas to preserve, but not to turn over to the court, the materials that Zonen had provided to him.

At the conclusion of Mehas's testimony, the trial court factually found that there was an understanding between Zonen and Mehas that Mehas was not to disseminate the materials received from Zonen to third persons. It also found that there was an understanding that Mehas was not to "talk about getting the materials from Mr. Zonen." The court determined that this understanding of confidentiality did not rise to the level of a conflict of interest.

Petitioner argued that Zonen had attempted to dissuade Mehas from cooperating with the defense. The trial court rejected this argument: "[Mehas] could not have been more clear on the witness stand, he testified that he made that decision not to cooperate not because of anything Mr. Zonen said to him, . . . [but because] he felt bad about Mr. Zonen's predicament because they had a relationship going back, I guess a few years, and because of that relationship he decided that he would not put Mr. Zonen in any sort of awkward circumstance. That he felt personally responsible. But that at no time did Mr. Zonen ever tell him not to cooperate with the defense, that was a decision that he made on his own."

The trial court also rejected petitioner's contention that the evidence established that Zonen had violated the law: "[T]o be fair, we don't know if there are violations of law or not, . . . that's entirely speculative. . . . [I]t's a little bit reckless to be claiming that there are violations of law when there's been no forum in which that determination has been made." Even if Zonen had violated the law in providing information to the filmmakers, the trial court perceived no reason "why the turning over of that information, one, is a conflict, and, two, prevents [petitioner] from having a fair trial."

The trial court reiterated its prior finding concerning Zonen's purpose in cooperating with the filmmakers: "I don't think there's . . . a factual issue regarding the reasons Mr. Zonen turned over the information. . . . [T]he purpose was to assist in the

capture of [petitioner]. No one has suggested otherwise in terms of his motivation. There's no financial interest here."

In denying the recusal motion, the trial court stated: "I don't believe that there's a conflict of interest. Any conflict of interest is remote and tenuous. I don't see any basis for the conclusion that [petitioner] cannot receive a fair trial in this case with Mr. Zonen as the prosecutor."

Why We Order Recusal of Zonen

There is no need to again set forth the standards for recusal under section 1424, the standard of review, and why we cannot affirm the trial court's ruling on the deferential standard of review. We did so in the companion case of *Haraguchi* filed this day. (See *Haraguchi,* at pp. 8-9.) Our views there apply here as well. Here, however, there is one over-arching consideration: The penalty sought.

This is a death penalty case. As our United States and California Supreme Courts have said, "'[d]eath is different.'" (E.g. *Ring v. Arizona* (2002) 536 U.S. 584, 606; *Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430.) "[I]n striking a balance between the interests of the state and those of the defendant, it is generally necessary to protect more carefully the rights of a defendant who is charged with a capital crime. (Citations.)" (*Id.,* at p. 431.) We thus give rulings in death penalty cases strict scrutiny. Where a prosecutor seeks the ultimate penalty, the prosecutor

should be held to the highest standards of the legal profession. In *People v. Superior Court* (*Greer*) (1977) 19 Cal.3d 255, our Supreme Court observed that a prosecutor is held to the "highest degree of integrity and impartiality" (*Id.* at p. 267), and the prosecutor must be free of "personal or emotional involvement" (*Id.*, at p. 267, fn. 8). Here, the conduct of Zonen, however well motivated, cannot reasonably be equated with the "highest degree of integrity and impartiality."

In this first impression death penalty case we should not give our imprimatur to Zonen's conduct or embolden other prosecutors to assist the media in the public vilification of a defendant in a case which is yet to be tried. Perhaps without intending to do so, Zonen has potentially infected the jury pool with his views on the strength of the People's case. Prosecutors should try their cases in courtrooms, not in the newspapers, television, or in the movies. As far as we know, no prosecutor has ever been a consultant (even without pay) to a film director on a pending criminal case that he or she is prosecuting. To say that Zonen went too far in his attempt to apprehend petitioner is an understatement. In his zeal to apprehend petitioner so that he could be brought to justice, Zonen virtually gave the entire file, owned by the public, to the filmmakers. This included audiotapes, videotapes, his trial notebook including work product, unredacted police reports, probation reports and psychiatric reports. Zonen also may have unintentionally provided the filmmakers with "rap sheets." We are aware

of no authority allowing a public prosecutor to give away, even temporarily, public property, especially when that property contains highly sensitive confidential information in a pending case.

There are restrictions on what information government employees may disseminate to third persons. (Unauthorized release of criminal records – see §§ 11105; 11140 et. seq.; police reports divulging the telephone numbers and addresses of victims or witness – see 1054.2; probation reports – see § 1203.05.) Perhaps realizing that he had gone too far in cooperating with the filmmakers, Zonen attempted to keep such cooperation secret. The trial court found that Zonen had an understanding with one of the filmmakers, Mehas, that he (Mehas) was not to tell anyone that he was getting materials from Zonen.

Zonen's conduct may have also created some evidentiary issues which cannot be ignored even at this juncture. For example, by disclosing his "work product" to third parties, he may have waived the right to confidentiality of his impressions of the strengths and weaknesses of the case.

Unlike the situation in *Haraguchi* where the prosecutor was motivated by a desire for literary fame and fortune, here Zonen gets high marks for his zeal in attempting to bring Petitioner to justice. This is consistent with his oath as a prosecutor. The manner in which he went about achieving his goal, however, is quite another matter.

As was the case in *Haraguchi,* our considered judgment is that justice would not be served if Zonen remains as the trial prosecutor. Phrased otherwise, in this situation, there is a likelihood that petitioner will not receive fair treatment if Zonen remains as the trial prosecutor. (*People v. Eubanks* (1996) 14 Cal.4th 580, 592; *People v. Vasquez,* (2006) 39 Cal.4th 47.) We make one further observation: even a cursory reading of the appellate reports has taught us that death penalty cases are subject to multiple reviews by state and federal courts with various courts often taking a "new" view of the matter. It should be the goal of any prosecutor to try the case once with as few appellate issues preserved for review as possible. (See *Haraguchi,* at pp. 8-9.) An appellate ruling at this juncture leaving Zonen in the case might well be a basis for reversal in the future. As we indicated in *People v. Winslow* (1995) 40 Cal.App.4th 680, 683, "As the moving party in a criminal action, it is the People's obligation . . . [to see that the trial is conducted in a manner] so that a lawful determination can be made and sustained on appeal." Leaving Zonen in the case is ill-considered when the stakes are so high. We see no real prejudice to the People beyond bringing another prosecutor up to speed.

Why We Do Not Order Recusal of The Entire Office.

As indicated earlier, petitioner seeks to have the entire office recused "based on the lack of evidence that [the district attorney] was unaware of the prosecutor's [Zonen's] disqualifying conduct." This is a

novel approach to the concept of who has the burden of proof. (See *Love v. Superior Court* (1980) 111 Cal.App.3d 367 [burden on defendant to show recusal is necessary]. Both in writing and at oral argument, petitioner has argued that the elected district attorney "had to have known" or "must have known," and therefore condoned Zonen's conduct. This is speculative. The record does not contain any declaration from the former elected district attorney[5] and there is no showing that he refused to provide a declaration at petitioner's request. In some instances, writ petitions are significant for what they omit as some counsel believe, as a matter of tactics, that it is better to argue from a silent record. In our view, the instant writ petition suffers from such an omission. Even if it could be shown that the former elected district attorney was aware of the cooperation and the specifics thereof, it does not logically follow that the entire office should be recused. To secure such an order, the showing must be "especially persuasive." (*People v. Hamilton* (1988) 46 Cal.3d 123, 139.) We presume that in death penalty cases, it is the ultimate decision of the elected district attorney to seek such penalty. Here, this decision was made before Zonen became a film consultant. To be sure, it may be reconsidered by the newly elected District Attorney of Santa Barbara County. Of course, we express no opinion on what penalty should be sought. Here we just do not see the

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[5] At an election held on June 6, 2006, a new district attorney was elected to a four-year term.

"especially persuasive" showing of a causal connection between Zonen's conduct, the former elected district attorney, and the remainder of the deputies in that office.

Conclusion

To the extent that petitioner seeks the recusal of prosecutor Zonen, the petition is granted. In all other respects, the petition is denied. The stay order previously issued is vacated.

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YEGAN, J.

I concur:

PERREN, J.

Concurring Opinion-Gilbert, P.J.

I respectfully concur:

I agree with my colleagues that our views stated in *Haraguchi* "apply here as well." I write separately to stress that these views apply irrespective of whether this is a death penalty case. What is "overarching" here is not the "penalty sought," but the patent conflict that requires recusal whatever the criminal charge.

I am mindful that our Supreme Court has echoed United States Supreme Court and federal decisions

emphasizing the necessity "to protect *more* carefully the rights of a defendant who is charged with a capital crime. [Citations.]" (*Keenan v. Superior Court* (1982) 31 Cal.3d 424, 430-431.) I also acknowledge that there may be cases in which legal principles apply differently because of the idiosyncratic nature of the case. (See *In re Joseph G.* (1983) 34 Cal.3d 429.) But this not one of them. I hope it is not naïve to suggest that a case in which a defendant is charged with a low level misdemeanor should receive as careful attention and scrutiny as the defendant charged with a serious felony or one facing the death penalty. For example, reasonable doubt is not a flexible standard calibrated according to the nature of the case.

However appalling the crime for which defendant was charged, he, like anyone charged with a criminal offense, is entitled to a fair trial with all its attendant constitutional and statutory safeguards. This includes not having to face a prosecutor who has a conflict making it unlikely that the defendant will receive fair treatment "during all portions" of his trial. (*People v. Eubanks* (1996) 14 Cal.4th 580, 592.).

The mere recital of the undisputed facts in the majority opinion lead to the ineluctable conclusion that the conflict here is so egregious that the defendant's right to a fair trial is severely compromised. Moreover, the prosecutor's alliance with a third party to whom he divulged his detailed work product and other documents in violation of the law, will so taint the trial that his recusal is mandated.

At oral argument the Attorney General stressed the sincerity and noble purpose of the prosecutor. I do not dispute or question the prosecutor's integrity, ability or commitment. His well-intentioned motives are beside the point. It is the consequences of his actions that prompt our decision. His actions allowed "show business" to cast an unseemly shadow over this case. The prosecution of criminal cases and entertainment enterprises are best kept separate.

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GILBERT, P.J.

Brian E. Hill, Judge

Superior Court County of Santa Barbara

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